

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
APPENDIX**

76-2158

ORIGINAL

To be argued by
ARTHUR T. CAMBOURIS

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

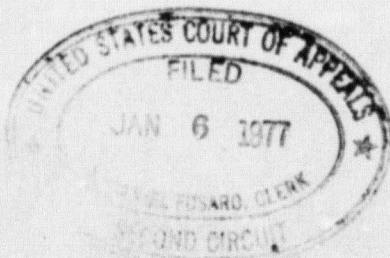
-----x
HENRY O. BOYD, SR., :
Petitioner-Appellant, :
-against- :
ROBERT J. HENDERSON, Superintendent, :
Auburn Correctional Facility, :
Respondent-Appellee. :
-----x

: Docket No. 76-2158

APPENDIX FOR APPELLANT

ON APPEAL FROM AN ORDER OF
THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

WILLIAM E. HELLERSTEIN
WILLIAM J. GALLAGHER
Attorneys for Petitioner-
Appellant
15 Park Row - 18th Floor
New York, New York 10038
[212] 577 -3420



ARTHUR T. CAMBOURIS
LAWRENCE H. SHARP
Of Counsel

B
P/S

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APPENDIX A

Docket Sheet
Entries of The District Court

OFFICE	YR	NUMBER	MO	DAY	YEAR	J	N/S	O	R	23	S	DEMAND	OTHER	JUDGE	CLERK	DOCKET	
	76	1029	06	04	76	3	530	1									

PLAINTIFFS

BOYD, SR., HENRY O.

HENRY O. BOYD, SR.

DEFENDANTS

HENDERSON, ROBERT J.

THE HONORABLE ROBERT J. HENDERSON
SUPERINTENDENT OF AUBURN CORRECTI-
AL FACILITY, AUBURN, NEW YORK

CAUSE

28 USC 2254 - petition for a writ of Habeas Corpus.

ATTORNEYS

For PLNTFF:
WILLIAM J. GALLACHER
15 PARK ROW - 18TH FLOOR
NYC, NY 10038
577-3420
ARTHUR T. CANEOURIS

For DEFT:
LOUIS J. LEFKOWITZ
TWO WORLD TRADE CENTER
NYC, NY 10047

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A-1

☐ CHECK
HERE
IF CASE WAS
FILED IN
FORMA
PAUPER'S

DATE

FILING FEES PAID
RECEIPT NUMBER

C.D. NUMBER

STATISTICAL CARDS

CARD DATE MAILED

JS-6

JS-6

2510-2

760 1020

BOYD vs HENDERSON

PROCEEDINGS

6-4-76	BY PLATT, J. - Order dtd 6-4-76 to proceed in forma pauperis file Notice of Motion ret 6-14-76 at 10:00 AM for an order directing that petitioner be released from custody etc. filed. Amended petition for writ of habeas corpus. (2)
6-11-76	Memorandum of law for petitioner filed. (3)
7-12-76	By BRUCHHAUSEN, J. - Order extending time to answer motion to from 6-14-76 to 7-14-76 filed. (4)
7-14-76	Memorandum of law in opposition filed. (5)
7-28-76	Before BRUCHHAUSEN, J. - Case called for petitioner's motion that he be released from custody of respondent Motion submitted Decision reserved
7-28-76	By BRUCHHAUSEN, J. Memorandum and Order dtd 7-23-76 dismissing the petition filed. Copy mailed from Chambers. mg (6)
8-4-76	JUDGMENT dtd 7-28-76 dismissing the petition filed. (7)
11-26-76	Notice of appeal filed. (8)
11-26-76	Letter dtd. 7-30-76 from LAS xxxxxx re: to grant a certificate of probable cause filed. (9)
12-3-76	Letter dtd. 8-11-76 from NYS Atty General re: opposition to application for a certificate of probable cause filed. (10)
12-10-76	By COSTANTINO, J. - Memo and order dtd. 12-1-76 granting certificate of probable cause filed. (11)
12-13-76	Civil appeal scheduling order filed. (12)
12-13-76	BY COSTANTINO, J. - order dtd 12-10-76 designating exhibit and permitting its transmittal to the Court of Appeals filed. (13)
12-13-76	Above record certified with exhibit A and mailed to the Court of Appeals

A TRUE COPY
ATTEST
DATED December 13 1976
LEWIS ORGEL
BY Margaret [Signature] CLERK
BY [Signature] DEPUTY CLERK

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APPENDIX B

Memorandum
of The District Court

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

-----x
THE UNITED STATES OF AMERICA, ex
rel. HENRY O. BOYD, SR.,

Petitioner,

-against-

THE HONORABLE ROBERT J. HENDERSON,
Superintendent of Auburn Correct-
ional Facility, Auburn, New York,

Respondent,
-----x

76 C 1029

July 23, 1976

MEMORANDUM AND ORDER

BRUCHHAUSEN, D.J.

The petitioner moves for a Writ of Habeas Corpus, pursuant to 28 U.S.C. 2241, 2254, upon the ground that the procedures used to secure eyewitness identifications of petitioner at his trial, violated his rights to counsel and due process of law under the Sixth and Fourteenth Amendments of the United States Constitution.

On May 28, 1975, the Appellate Division, Second Department, unanimously affirmed the judgment, without opinion (48 A.D. 2nd. 769), rejecting the arguments of constitutional infirmity in the eyewitness identification procedures and testimony.

In his brief to the Appellate Division, the petitioner asserts substantially the same ground, in these words:

"The pre-trial court identifications by the prosecution's witnesses should have been suppressed. x x x Appellant was deprived of his right to the assistance of counsel, during the arraignment confrontation."

Leave to appeal to The New York Court of Appeals was denied on June 25, 1975.

In *Gemmel v Buchkoe*, 358 F.2d 338, 341, cert. denied in 385 U.S. 962, the court stated:

"Counsel for the petitioner presents questions as to whether the petitioner was denied due process of law because he was not represented by counsel at the preliminary examination. x x x The District Judge decided these issues adversely to the petitioner. x x x We agree with the decision of the district judge."

The court has examined the files of this case in the State Courts.

On July 31, 1972, the petitioner was found to be an addict.

A pre-trial hearing was held.

The complaining witness, Mrs Riordan, testified at the pre-trial hearing and at the trial. The procedures were in conformity with settled law. See *Pettett v U.S.* 434 F.2 1051; *U.S. v Black*, 412 F.2 687, cert. denied in 396 U.S. 1018; *U.S. v Lipowitz*, 407 F.2 597, cert. denied in 395 U.S. 946; and *U.S. v Hurt*, 476 F.2 1164.

Upon due deliberation, it is ordered that the petition be and it is hereby dismissed.

Copies hereof will be forwarded to the attorneys for
the parties.

Walter Bruchhausen
Senior U.S.D.J.

APPENDIX C

Petition for
The Writ of Habeas Corpus

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

-----X
UNITED STATES OF AMERICA, ex rel. :

HENRY O. BOYD, SR., :

Petitioner, :

-against- :

THE HONORABLE ROBERT J. HENDERSON, :

Superintendent of Auburn Correctional
Facility, :

Auburn, New York, :

Respondent. :

NOTICE OF MOTION

76 Civ. 1019

-----X
S I R S :

PLEASE TAKE NOTICE, that pursuant to the annexed
petition and memorandum of law, the undersigned will move
this Court at the Courthouse, 225 Cadman Plaza East, Brooklyn,
New York on the 14TH day of ^{JUNE} May, 1976, at 10:00 a.m. for
an order directing that the petitioner, HENRY O. BOYD, SR.,
be released from the custody of the Respondent unless he is
retried forthwith.

Yours, etc.,

WILLIAM E. HELLERSTEIN
WILLIAM J. GALLAGHER
The Legal Aid Society
Attorneys for Petitioner
15 Park Row - 18th Floor
New York, New York 10038
[212] 577-3420

TO: CLERK

United States District Court
for the Eastern District of New York
225 Cadman Plaza East
Brooklyn, New York 11201

HON. LOUIS J. LEFKOWITZ
Attorney General
State of New York
Two World Trade Center
New York, New York 10047

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

-----X
UNITED STATES OF AMERICA, ex rel. :
HENRY O. BOYD, SR., :
Petitioner, : PETITION FOR A
-against- : WRIT OF HABEAS CORPUS
THE HONORABLE ROBERT J. HENDERSON, : 76 Civ.
Superintendent of Auburn Correctional
Facility, :
Auburn, New York, :
Respondent. :

-----X
STATE OF NEW YORK)
: SS.:
COUNTY OF CAYUGA)

HENRY O. BOYD, SR., being duly sworn, deposes and says:

1. I am currently in the custody of the respondent, superintendent of Auburn Correctional Facility at Auburn, New York, pursuant to a judgment of the Supreme Court of the State of New York, County of Kings, rendered September 12, 1972, convicting me after a jury trial of robbery in the first degree, grand larceny in the third degree, and burglary in the second degree [New York Penal Law §§160.15, 155.30, 140.25], and sentencing me to concurrent indeterminate terms of imprisonment for a maximum of ten years.

2. The Appellate Division, Second Judicial Department affirmed the judgment without opinion on May 28, 1975. Leave to appeal to the New York Court of Appeals was denied by the Honorable Charles D. Breitel, Chief Judge, on June 25, 1975. The Appellate Division's order of affirmance

and the certificate denying leave are annexed as exhibits.

3. My present restraint by the superintendent is unlawful because the judgment of conviction was obtained in violation of my rights under the Constitution of the United States, Sixth and Fourteenth Amendments.

4. I was identified by two eyewitnesses at my trial. One, Fredricka Riordan, claimed that I was the one who forcibly entered her apartment on June 23, 1971. She first made this claim on August 10, 1971, when I was in state custody on ~~a~~ charge and was supposed to appear in Criminal Court on that charge, where the Legal Aid Society represented me. She testified that she identified me as I entered the Criminal Court on that date from the detention area. I was not informed of this confrontation beforehand, never was advised of my right to the assistance of counsel, and never waived my right to counsel's assistance. As the testimony at the pretrial hearing and at trial reveals, no one of the small number of other black defendants who were produced in court that morning remotely approximated my appearance. This pretrial confrontation, and the admission at trial of Mrs. Riordan's pretrial and in-court identifications, violated my rights to counsel and to due process of law.

5. I was initially identified by the second eyewitness, Mary Arrington, during a hearing in Supreme Court on March 7, 1972 challenging the validity of identification testimony. The court allowed the prosecutor to call this witness over the objection of my attorney that, unless a lineup were conducted first, I would be exposed to an unnecessarily suggestive showup that was conducive to irreparable misidentification by a witness who had never before identified me in person or by photograph. Mrs. Arrington

then identified me when there were no spectators in the courtroom, no other black people, and I was seated at the counsel table with three uniformed court officers standing behind me. The admission at trial of Mrs. Arrington's identification testimony deprived me of due process of law.

6. These two women have misidentified me. I had never seen them before my arrest, and am innocent of the charges upon which I was convicted.

7. These issues were fully presented before the trial court, on appeal to the Appellate Division, and before Chief Judge Breitel at the leave hearing. All state remedies therefore have been exhausted. No prior application for a writ of habeas corpus challenging this judgment has been made.

8. Our legal and factual arguments are discussed more fully in the accompanying memorandum.

WHEREFORE, petitioner respectfully asks this Court to direct that he be released from the custody of the Superintendent unless he is immediately retried under such time limitations as the Court deems just.

Henry O. Boyd Sr.
HENRY O. BOYD, SR.

Sworn to before me this
18 day of May, 1976

Dorothy J. Burns

DOROTHY J. BURNS
Notary Public, State of New York
No. 1452
Qualified in Cayuga County
Commission Expires March 30, 1978

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

-----X
UNITED STATES OF AMERICA, ex rel. :

HENRY O. BOYD, SR., :

Petitioner, :

-against- :

AFFIDAVIT

THE HONORABLE ROBERT J. HENDERSON, :

Superintendent of Auburn Correctional
Facility,
Auburn, New York, :

Deponent. :

-----X
STATE OF NEW YORK)

: ss. :

COUNTY OF CAYUGA)

HENRY O. BOYD, SR., being duly sworn, deposes and says:

That deponent is the petitioner in the within proceedings;
that deponent has read the foregoing petition and knows the
contents thereof; that the same is true to deponent's own
knowledge.

Henry O. Boyd Sr.
HENRY O. BOYD SR.

Sworn to before me this
18 day of May, 1976

Dorothy J. Burns

DOROTHY J. BURNS
Notary Public, State of New York
No. 1472
Qualified in Cayuga County
Commission Expires March 30, 1978

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A - May 5, 1975.

132 E

The People, etc., respondent,
v. Henry O. Boyd, Sr., appellant.

William E. Hellerstein and William J. Gallagher, New York, N.Y.
(Lawrence H. Sharf of counsel), for appellant.

Eugene Gold, District Attorney, Brooklyn, N.Y. (Elliott Schulder
of counsel), for respondent.

Judgment of the Supreme Court, Kings County, rendered September
12, 1972, affirmed. No opinion.

RABIN, Acting P.J., HOPKINS, LATHAM, MUNDER and SHAPIRO, JJ.,
concur.

May 28, 1975.

PEOPLE v. BOYD, HENRY O. SR.

1132 E

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RECEIVED
CLERK OF THE COURT
JULY 1 1975
ON THE APPEAL

A/A

State of New York Court of Appeals

BEFORE: HON. CHARLES D. BREITEL, Chief Judge

THE PEOPLE OF THE STATE OF NEW YORK
Respondent,

against

HENRY O. BOYD, SR.,

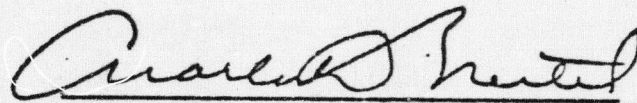
Defendant-Appellant.

CERTIFICATE
DENYING
LEAVE

I, CHARLES D. BREITEL, Chief Judge of the Court of Appeals of the State of New York, do hereby certify that, upon application timely made by the above-named appellant for a certificate pursuant to CPL 460.20 and upon the record and proceedings herein,* there is no question of law presented which ought to be reviewed by the Court of Appeals and permission to appeal is hereby denied.

Dated at New York, New York
June 25, 1975

William E. Hellerstein
and William J. Gallagher, Esqs.
Legal Aid Society
119 Fifth Avenue
New York, New York 10003



Chief Judge

Hon. Eugene Gold
District Attorney, Kings Co.
Municipal Bldg.
Brooklyn, New York

Clerk, Court of Appeals

*Description of Order:

5-28-75 App. Div. 2nd affmd. 9-12-72 Sup. Ct., Kings Co.

APPENDIX D

The Minutes of The
Pretrial Identification Hearing
Held in The Supreme Court, Kings County

SUPREME COURT : KINGS COUNTY (Wade Hearing)
CRIMINAL TERM - PART 8

-----X
THE PEOPLE OF THE STATE OF NEW YORK

-against-

HENRY BOYD,

Defendant :

: STENO No. 5945

: APPEAL No. 9614

-----X
(Ind. No. 5620/71

Brooklyn, New York
March 7, 1972 et seq

Before:

Hon. BENJAMIN ABRAMS,
Justice.

Appearances:

EUGENE SCHWARTZWALD, Esq.,
Assistant District Attorney
For the People

PAUL MADDEN, Esq.,
Legal Aid Society
For the Defendant

Roland M. Heyman, C.S.R.,
Official Court Reporter

DH

MR. SCHWARTZWALD: People move 5620 of 1971, People against Henry Boyd for trial, your Honor.

MR. MADDEN: If it please the Court, the defendant is ready for a Wade hearing, your Honor.

THE COURT: Are you ready for a Wade hearing?

MR. SCHWARTZWALD: Yes, your Honor.

People call as the first witness, Fredricka Riordan.

F R E D R I C K A R I O R D A N, 43 Joralemon Street, Brooklyn, New York, called as a witness in behalf of the People, being first duly sworn, testified as follows:

DIRECT-EXAMINATION

BY MR. SCHWARTZWALD:

Q On June 23, 1971, were you living at 43 Joralemon Street, County of Kings?

A I was.

Q At about three o'clock in the afternoon did something happen?

A Yes.

Q What exactly happened? Start from the very beginning.

A My cleaning woman Mary Arrington was getting ready to go home, and at three o'clock the doorbell rang. We

were expecting her husband to pick her up that afternoon, so I went to the door, and expecting her husband I opened the door and I was confronted with the defendant, who inquired whether or not Sam lived at that address. I said no, thought he made a mistake. He asked if my husband was at home. I said no. I was certain he made a mistake. I attempted to close the door. At this point he pushed his weight against the door and pushed it open and I saw in his left hand a small -- description, automatic weapon silver in color. I was behind the door pushed to the wall.

MR. MADDEN: Excuse me, your Honor. I can't hear with those people talking there.

THE COURT: How about closing the door.

Q How were the lighting conditions at this particular location?

A All the lights were on and the daylight was coming through.

Q How close were you to the defendant?

A A foot.

Q How is your vision?

A Tenty, twenty.

Q How long would you say you talked to him by the door?

Riordan-direct

THE COURT: How is your vision? Is it good?

THE WITNESS: Excellent.

THE COURT: Good. All right.

Q And approximately how long did you talk to him by the door about your husband not being home?

A When I opened the door I looked him straight in the face and I spoke to him for--perhaps thirty-five seconds, this exchange of conversation.

Q Is that before he pushed his way in?

A Yes, that was before he pushed his way in and before I attempted to close the door on his arm.

Q What happened next? Now he's inside?

A I was--the door opens inward and I was caught between the door and the wall. Mrs. Arrington came running out from the bathroom. A second gentleman came in behind the defendant. Mr. Boyd looked and asked who-what was behind the closed door in the lower hall. I replied it was my child. He was asleep in the room. He then asked whether or not there was anyone else in the house and I said no. He said if there was anyone else in the house that he would kill us. He then went upstairs. He fled through the basement of our duplex. Went upstairs. The second man then asked whether or not I had any money. He asked for my wallet. I gave him my wallet. He then tried to

force Mrs. Arrington and myself into the hall closet. He couldn't get us both in so he changed his mind and then he asked me if I had any jewelry. I told him what was in my bedroom. It was in the case on the mantle on the fireplace. He didn't understand what I was trying to say, so he moved us from the closet, pushed us down the hall to the bedroom. I took the jewelry case off the mantle and I threw it on the bed and he examined the contents and asked whether I had any better jewelry than what was in the case. I said no, I had no diamonds. I had nothing of value. At this point Mr. Boyd had returned from the upper levels of the house and the second man indicated that we should get into the closet, that if we cooperated and got into the closet nothing would happen to us. I asked them what they wanted. He said he wanted money, he wanted jewelry. I said I had neither. We cooperated. We went to the closet. They closed the door, and Mr. Boyd was screaming obscenities at this point, and the second man said they should just hurry and get out, and let's cause as little difficulty as possible. When we were in the closet they secured the door with a wing chair. I heard a thump and realized the door had been closed. They were in the house for about ten minutes after that. I could hear them moving through the house. After I was certain that

they were gone, we stayed in the closet perhaps another twenty minutes and then we tried to force the door. Because the wing chair was on a piece of thick carpet, we were by repeated pushes on the door able to get the chair to slide away. We then went to the baby's room, grabbed the baby and ran to the bar across the street where we called the police.

Q Did there come a time--well, let me ask you this. You said you looked at the defendant for about thirty or thirty-five seconds while you were having a conversation when you opened the door originally?

A Yes.

Q For what other periods did you look at the defendant, besides the part at the door?

A I saw him during the conversation that he was having, where he was behind the door. When I said my child. When he came back from the upper floors of the house. I saw him again in the bedroom. I saw him clearly.

Q And did you give a description to the police when the police arrived?

A Yes, I did.

Q And did there come a time that you saw this defendant once again?

A Yes.

Q Was that on or about August 10th?

A Yes. Circumstances were such that I had gone to my mother in St. Louis for several weeks, and I was called by my husband and told that the car that had been used in the robbery had been found and that someone had occupied the car, and that the police were interested in knowing whether or not the person that they had found in the car was perhaps one and the same person who had robbed me. So I made arrangements to come back to New York City. I was called by Detective Fitzgerald and I was taken to the Criminal Court building to one of the hearing rooms. I was told that the man was going to be arraigned on possession of a stolen automobile. I sat in the courtroom for about twenty minutes watching the front of the room. There was a Judge seated there, cases were being heard, and I watched the front of the room until I saw the defendant appear.

Q How many people would you say they paraded in front of the Judge while you were waiting the twenty minutes?

A Probably between six, eight people. There were many cases being heard.

Q And how many blacks approximately, of the six or eight?

A They were black with the exception of two Puerto Ricans that were being heard.

Q And when you saw the defendant, what did you tell Fitzgerald?

A I said, "That's him." He said, "Who?" I said, "That's the man." And he said, "Where?" And I pointed way in the right hand side of the courtroom.

Q And do you see that person in the courtroom today?

A Yes.

Q Would you please point him out?

A Sitting at the table.

MR. SCHWARTZWALD: Indicating the defendant.

Your witness.

CROSS-EXAMINATION

BY MR. MADDEN:

Q Mrs. Riordan, before coming to court today did you read any materials at all to refresh your recollection?

A I discussed my past testimony with the District Attorney.

Q You mean at the preliminary hearing and at the Grand Jury?

A Yes.

Q And did you read any police reports?

A No.

MR. MADDEN: May I see the August information?

MR. SCHWARTZWALD: What's that?

MR. MADDEN: Whatever she used to refresh her recollection.

MR. SCHWARTZWALD: Well, you have the Criminal Court minutes, and I guess the Grand Jury minutes.

MR. MADDEN: I don't have the Grand Jury minutes.

MR. SCHWARTZWALD: Let the record show the District Attorney is giving Mr. Madden the Grand Jury minutes of September 15, 1971, to be deemed marked One for identification.

BY MR. MADDEN:

Q And all you looked at was the Grand Jury minutes in the preliminary hearing?

A I didn't even read them. We discussed the testimony that I had given.

MR. MADDEN: May I just have a few moments, your Honor?

(Brief pause and resumed.)

Q Prior to June 23rd, did you know or had you ever seen either one of these two individuals?

A No.

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Q And how long would you say that the entire incident took from the time that they rang the doorbell and you answered the door and the time that they left the premises as far as you know?

A I would say they were probably out of the house in about fifteen minutes. I was not wearing a watch. I would say this is a sense of time. I never wear a watch so I have to rely upon my own sense of time. It was very fast. It was very fast.

Q Fifteen minutes?

A About fifteen minutes, yes.

Q You mean from the time they rang the doorbell?

A The time they rang the doorbell and the time we were put in the closet and went through the house. We stayed in the closet--the entire thing took about forty minutes. When we went into the bar across the street I looked at the clock and it said twenty of.

Q And what time did they come in?

A Three o'clock. Exactly three o'clock because I was in the back of the house when I heard the doorbell ring and I had to pass through the bedroom, my bedroom, and I looked at the clock and it was three and Mr. Arrington was to come at three, which is why I thought Mr. Arrington would be at the door when I opened it.

Q You say they were probably out of the house by 3:15?

A 3:15, yes. 3:20.

Q And during the course of this--how long after they fled the premises would you say--how much time elapsed between that time and the time you went into the closet?

A About five minutes. Yes, about five minutes.

Q Then you mentioned that the taller of the two was down or upstairs while the second male was in the bedroom?

A Yes.

Q And you say that initially when the doorbell rang the taller of the two was the first one that you saw?

A That's correct.

Q And he asked you is Sam here?

A That's correct.

Q And you said there is no Sam?

A I said, "There's no Sam at this address."

Q And then he asked if your husband is home?

A Yes.

Q And you said it was a mistake?

A Mistake. And then when I tried to close the door--

Q Was there any hesitation between questions?

A There was a hesitation. I looked at him. When I looked at him I thought, this man is in error. When I opened the door I'm sure he's made a mistake in coming to my door. He asked me the question, and I said no. I was sure he had made a mistake, and then there was a pause. . Yes, a lengthy pause because he thought of what else to ask me. And then he said, "Is your husband at home?" At which point I had a strong suspicion as to exactly what the nature of the visit was. I said, "No, there must be a mistake."

Q You didn't have any suspicion?

A Not when I opened the door, no. When he asked me the initial question.

Q Then you say he pushed the door inward?

A That's correct.

Q And were you behind the door?

A Yes.

Q And he came in first?

A He came in first.

Q What happened after that? Any conversation?

A The second man followed him in. And Mr. Boyd initiated the conversation by inquiring as to who was present behind the closed door. And this is the lower

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hall of our house which is approximately six feet wide, ten feet deep. We were all in this very close area at this point. The door of the child's room is right at this point.

Q Where was Boyd standing at this time?

A He was standing at the door. I was behind the door, and he was straight in front of me. The other man was--they had closed the door by this point, and the other man was standing right there behind the door. There was the other man, there was me, there was Mr. Boyd. Mr. Boyd was at the base of the stairs at this point.

Q Boyd was to your right at this time?

A Boyd was directly ahead of me. If you come in the bottom door the door opens this way. There's the brick wall and then the stairs pick up about ten feet.

Q Was Boyd facing you at this time?

A Side view. Side view. This is the point where Mrs. Arrington came running out of the bathroom.

Q What happened then after--how long did this conversation take?

A "Who's behind that door? My son. Who is in the rest of the house? Absolutely no one. Who's upstairs? Absolutely no one. If there's anyone else here I'm going to kill." At which point he went upstairs.

Q And the second male?

A The second man, the second man wanted--did I have any money? And I took out my coin purse. He emptied the contents of the coin purse.

Q Then you were in the bedroom for a while?

A The second man indicated he wanted us to get in the closet. We couldn't both get into the closet--

THE COURT: Is it necessary to go into the second man? This is a Wade hearing. This is not the trial. This is a Wade hearing.

Q How long would you say you were in the bedroom with the second man alone?

A Alone? Just a couple of minutes. Just as long as it took me to get my jewel case, to put it on the bed, to have him examine the contents of it and ask me if I had any better jewelry than what was in there. He glanced at my hands to see if I was wearing a diamond. I wasn't.

Q After a couple of minutes you say Boyd came back?

A Boyd came back downstairs.

Q There was a conversation?

A Yes. We were told to get into the closet. The second man told Mr. Boyd they should hurry their business.

Q Then you went into another closet?

A We went into a closet in my bedroom.

Q That was the last closet?

A Yes. I asked again what they wanted. Money, jewelry. I said I had neither. "If you get into the closet," said the second man, "there wouldn't be any difficulty." So we did according to his wishes.

Q Did you tell us you went across to a bar and called the police?

A Yes.

Q Did you call the police?

A No, the bartender. Mr. Grimaldi. I was holding my child and Mrs. Arrington was getting a glass of water. He called the police.

Q Then the police came?

A Yes.

Q Do you know which police officer you spoke to?

A I spoke to a redheaded police officer. I think his name was Morgan. The second policeman I saw here today whose name is Luchasi, or Lacarelli.

Q Were these both from the 84th Precinct?

A Yes, they were.

Q You told them what happened?

A Yes.

Q Did you give them a description?

A We gave them a description at the time. And Mr.

Grimaldi the bartender gave them a description of a car and the license number that he saw in front of my home, and he described to them the fact that he saw them removing televisions, et cetera, and what he felt to be a projector case. What was in fact a portable sewing machine from my home, and putting it in the back seat of the car.

Q Did he see the two individuals involved?

A He saw that they were two black men.

Q That's all he saw?

A That's all he saw. That's all I can remember. That's all I've discussed with him. He said they were two black men. He does confirm the description of the height of the men, the type of hairdo, the sideburns, the general description of the clothes. He said he was certainly in no position as to the faces, but he did confirm the general physical description that Mrs. Arrington and I gave to the officers.

Q What description did you give to the police?

A I told Detective Fitzgerald--

Q No, not Detective Fitzgerald. Locarino (Phonetically) or Morgan?

A Extremely tall. Extremely tall. Very tall. I said well over six feet. Lean, muscular build. Afro hairdo.

Markedly discolored front teeth.

Q What does that mean?

A That means when I was standing in the doorway looking at him I was able to see that his front teeth looked as if they ad been abused. Whether by injury or disease I don't know, but he didn't have a set of healthy teeth. I noticed specifically his two front teeth as being discolored.

Q You mean they were like corroded?

A Gray, discolored. Not corroded.

Q Broken?

A Not broken, discolored. He didn't have white teeth.

Q You say the front two teeth--

A The front two teeth are what I fixed on, yes.

Q You say he was extremely tall?

A Yes, because I was straining my neck up at him.

Q How tall are you?

A I am five-six.

Q And you saw that he was lean and muscular?

A Yes, very muscular.

Q He wasn't thin build?

A Skinny? No. Lean and muscular.

Q Did he have a thin build?

A Thin? Do you mean puny, scrawny?

Q I don't know. What does thin mean?

A What does thin mean to you?

THE COURT: Explain to her what you mean by thin.
He wasn't fat?

THE WITNESS: He was a man well developed,
muscular, who had no evidence of fat. His muscles
were well developed. Lean, absence of fat, muscular.

Q Let me ask you this, ma'am. You didn't tell
the police that he had the thin build?

A No. Lean and muscular.

Q What color clothes was he wearing?

A He was wearing a white short sleeved shirt, open
necked.

Q And what color pants?

A Of the Khaki family. The khaki family. Any of
these gaberdines or twills that are worn in the summer.
This was a blue or gray or brown, in comparison to the
white of the shirt. My memory would fail me. I couldn't
give you a positive--but it was a light pair of summer
pants.

Q How long were his sideburns? Below his mouth?

A No, they were down to here. Also as I was standing
in the doorway looking at him I noticed he had the
beginnings of a moustache. I thought he was trying to grow

one. This also stuck in my memory. I thought either he hasn't shaved or starting to grow a moustache. He had hair on the side of his face also.

Q You told that to the police?

A Yes.

Q And let me ask you this, ma'am. When you told this to the police, were they writing the stuff down?

A I certainly hope they were. They had their pads of paper out. I don't know whether they were just putting down general impressions or what.

Q When you say they were putting down--

A They were actually writing. The patrolman who was here today, was in the bar with Mrs. Arrington and myself when this was going on. I gave information in the bar. Someone was writing in the bar. I gave information when we were standing in the street. I was going into it in more detail. One was writing, yes. I would assume so because I did give a description. Mrs. Arrington gave a description, and Mr. Grimaldi confirmed the description.

Q Now, this fellow you say was well over six feet tall, is that right?

A Yes.

Q He would be six-two?

A Much more than six-two.

Q How old would you say he was about?

A I said at the time--and as all descriptions are a compromise, I voted for very late twenties, early thirties. This is what I thought he was. I thought the other one was in his late thirties. I'd say if we're going on an average it would be about thirty. I think it went down officially as late twenties. I'm thirty. He was not that much older than myself.

Q You said it went down late twenties?

A The description when I spoke to the detective. He said, "All right." He said, "Over six feet?" And I said, "Yes, well over six feet." And he said, "How tall?" I said, "Very tall." Being a woman I think men tend to think that perhaps anything is taller than myself is tall. So six-two was arrived at as perhaps a very tall man, late twenties, early thirties. Late twenties.

Q Did you get a description of the other man?

A Yes. He was about five-ten, heavy set, late thirties, small moustache. He had on a cap, blue jacket.

Q And when did you see Detective Fitzgerald for the first time?

A The next day.

Q That would be the 24th?

A Yes.

Q And did you tell him what these men looked like?

A Yes.

Q Was it the same thing or something different?

A No, no, the same thing.

Q The same thing.

A Yes.

Q Now, did Detective Fitzgerald indicate to you that he had spoken to Morgan or Lacarino?

A I would assume he had. He called me and read some sort of report. It had been described to him. I had given statements as to what had been taken, and he was aware of what had been taken, and was confirming this, so I would assume he had spoken to either one of them.

Q Did you speak to any other officers other than these three?

A No.

Q When after the 24th did you see Fitzgerald again?

A It wasn't until August. Until I saw him that day in the Criminal Court Building.

Q And had you spoken to Fitzgerald or any other police officer in connection with this case other than the 24th?

A No. Not--if it was, it was simply a refiling of the

details. Certainly nothing else. But I gave the statement and I spoke to Detective Fitzgeralds. We refined the details. We went over the exact sequence of events so he could complete his report and then the next--

Q Did you ever go down to the Bureau of Criminal Identification to take a look at any photographs?

A No, I did not.

Q Do you know if Mrs. Arrington went?

A Mrs. Arrington did go.

Q Did they ask you if you wanted to go?

A They asked me if I wanted to go, but I saw no purpose because I felt that the shots would probably be so bad--my passport picture doesn't look like me--so I felt nobody's interest would be served, at least my own interest, by looking at photographs.

Q Did you gather the impression that Detective Fitzgerald was working hard on this case trying to find the culprit?

MR. SCHWARTZWALD: Objection, your Honor.

THE COURT: Sustained.

A I would object myself. Yes.

THE COURT: How can she tell how hard the detective worked? Did she follow him around every minute of the day or night? She wouldn't know.

Q Did you ever see any photographs in connection with this case?

A No.

Q Not at the garage or--

A No.

Q I assume that you were quite nervous at the time this incident occurred, is that correct?

A Which incident?

Q The 23rd?

A To say that I was not afraid, I was afraid. I was afraid.

Q Were you hysterical?

A No, never. At no time was I hysterical. Not at that time or after.

Q Now, you say that you were in St. Louis and your husband called you?

A Yes.

Q And he mentioned to you that Detective Fitzgerald had called him?

A Had called him. That's correct.

Q What did your husband tell you?

A He told me that Detective Fitzgerald called him and had informed him that the car which had been reported by Mr. Grimaldi, identified by Mr. Grimaldi as being used to

remove goods from our premises had been found in Brooklyn. They had found a gentleman in the car, and would I be willing to identify or at least see if the man who had been picked up in the car was the man who had robbed me.

Q And then you came back to Brooklyn?

A That's correct.

Q And did you speak to Fitzgerald on the telephone before going down to court?

A Yes, I did.

Q What did he say to you?

A He told me that this man was being arraigned on the charge of possession of a stolen automobile. That it was the automobile that had been described by Mr. Grimaldi, and he explained that he would be arraigned in Criminal Court building on a particular day, and asked if I would go to the Criminal Courts building with him, sit in the hearing room and if I saw him to point him out.

Q Did he tell you that this man fit the description of the one you gave?

A General physical description. I think he probably did.

Q Well, let me ask you this question. At the Grand Jury a question was asked by the Assistant District Attorney on September 15th.

"Q Did he ask you to come to the police station and identify a possible defendant?

"A I had gone to my mother's house in St. Louis, and I received a call from my husband who said that Detective Fitzgerald had been in contact with him and he found a man on another charge that fit the description and he told me the hearing would be the following week, and I made arrangements to return to the City. And Detective Fitzgerald took me to the Criminal Court building and I was in the hearing room and I watched the defendant as he entered--it must be the defendant--the court area. As I watched I saw Mr. Boyd enter and I pointed to the defendant and I said, "That is the gentleman."

A Yes.

Q After listening to that, you made that answer I assume, is that correct?

MR. SCHWARTZWALD: I object, your Honor. There's nothing inconsistent.

THE COURT: All right, she made the answer.

Q So he did tell you that the man you were going to view in the courthouse fit the description in his opinion?

A The description that I had given him, yes.

Q And he told you that?

A Yes.

Q He actually picked you up and drove you down?

A Yes.

Q And you talked about the case on the way down?

A No, we didn't. They went and answered another call while I was in the car. It was some shooting and the man was dead on arrival and I got dropped off at the Criminal Courts building, and they would see me later.

Q Was Fitzgerald by himself?

A No, he was with another detective.

Q Did he talk to you at all about who the other person was in the courthouse or the charge?

A The arraignment of stolen automobile. I knew that.

Q And he told you what his name was?

A Yes.

Q Henry Boyd?

A Yes.

Q Are you aware as cases are called in the Criminal Court, after being there that day, that they call it not by the docket only--

A His name was not called.

Q Was not?

A Not called, no.

THE COURT: At least you didn't hear it?



THE WITNESS: I didn't hear it. I didn't hear his name called.

THE COURT: All right.

Q Mrs. Riordan, where were you sitting--withdrawn. Did you say the defendant walked out of a door of that building?

A He walked out of the right hand side.

Q You knew that he was in custody, is that correct?

A I didn't know what was happening. I don't know the arrangements of the Criminal Court. I don't know how prisoners are brought in or let out. I knew that he at some point, the man in question, would appear. And if I saw him I was to point him out. I was not briefed on how, when and in what a manner.

Q And let me ask you this. Where was Fitzgerald sitting? With you?

A He was sitting right next to me, and we were sitting in about the fourth row back.

Q Were you directly in front of the door?

A On the right hand side, yes. We were sitting on the right hand side of the court.

Q And you said to him, "That's the gentleman"?

A Yes.

Q As each person came out, did Fitzgerald say

anything to you?

A No, no.

Q Did he say anything to you before Boyd came out?

A No.

Q Did he say anything after Boyd came out?

A No. I said, "That's the man." He said, "Who, which one?" I said, "That one." And I pointed to the one on the right hand side.

Q And at this time was Boyd standing by himself?

A Yes, he was.

Q And after you made the identification at the Criminal Court, did you have a conversation with Fitzgerald?

A Did I? No, he got up immediately and he approached the Bench. And then the next thing I knew Mr. Boyd was being led out. I was called and I was asked to sign a formal complaint. And then a date was set for the hearing. And then I saw Mr. Boyd again at the hearing.

Q Did Fitzgerald say that's the gentleman? Did he say anything to you?

A Did he say anything to me? He said, "Are you sure?" I said, "Yes, that's the one." And he said, "All right." And he went up. Now, obviously he knew that was Mr. Boyd, because he immediately went up and approached the Bench and

Mr. Boyd was taken into custody. So I would assume by his action he knew that was Mr. Boyd. I identified him as Mr. Boyd and we were all of one mind.

Q Did Fitzgerald indicate that you picked out the right man?

A I assume, otherwise he would have turned to me and said that's not the man we picked up.

Q As Fitzgerald was sitting there did he have a calendar in his hands--not the normal calendar of the days--but like a court calendar?

A No. He had a roll of life savers as a matter of fact.

Q Any name on the life savers?

A No, I don't remember the flavor.

Q Was any of the property recovered, ma'am?

A No.

Q I don't know if you know the answer to this question or not. You say that you went to the courthouse and you went to a certain room. Was this a big room?

A Pardon?

Q Was this a big room, courtroom?

A It was on the first floor in the rear, if you went in. You went straight down, took a right turn right there back of the telephones in the hall to the left.

Q How long was the courtroom?

A It was vast. It was like a church.

Q It was one of the bigger courtrooms?

A Yes. Very high ceiling. Relatively new. Indirect lighting.

Q This was approximately seven weeks after this occurred?

A Yes.

Q Have you had any special training in identification or anything like that?

A No.

MR. SCHWARTZWALD: Objection.

Q You haven't had any?

A In specific identification?

Q Identification?

A Well, what--define training.

Q For example, people in the police department go through special training, or if you were--

MR. SCHWARTZWALD: I object, your Honor. Whenever I have police officers he never defers to their training.

THE COURT: Maybe it works out that she had some type of training.

MR. MADDEN: Maybe she's a specialist.

THE COURT: The answer is no, it is no.

Q You haven't had any training in identification?

A In identification? No. In college I minored in art history, and I took about ten courses in art history, and I have an excellent visual memory.

Q What was Mrs. Arrington wearing that day?

A Mrs. Arrington was wearing one of her customary skirt and sweater outfits. Usually a neutral color.

Q What was Fitzgerald wearing the first time you saw him?

A He was wearing a black and white Jacket and he had on these very flashy chrome sunglasses and I thought, this is a detective?

Q And he had his motorcycle?

A Yes. He had on a black and white jacket and he had on a very large pair of chrome sunglasses.

Q And do you remember your husband spoke to you on the phone in St. Louis?

A Yes.

Q And you had that conversation. Do you remember exactly--you can't remember exactly--as close as you can to what he said to you. Can you tell us what he told you over the telephone?

A He told me they had found the man answering the description that I had given the police and the car that

was identified by Mr. Grimaldi, or at least fit the description given, and the car identified by Mr. Grimaldi.

Q And you felt at that time when you went down to identify Boyd that they had the right man?

A That's a, you know, do you still beat your wife question. I went down with a completely open mind. If he hadn't been there I wouldn't have identified anybody.

Q Do you think the fact that they mentioned to you that they had found the man and the car that was allegedly used in the case, and also that this man fit the description you gave, do you think that had anything to do with the suggestibility to you?

A No.

Q You did this all on your own, is that correct?

A Yes.

Q And did you speak to any other police officers at the time you were in the criminal court after you said that's the gentleman?

A No. I just picked--Detective Fitzgerald went to the front of the courtroom and he led Mr. Boyd out and then I left. I went home.

Q Did the person, the taller of the two individuals in the house that day, other than the discolored teeth and the thin moustache and the sideburns, did he have any

distinctive features about him? For example, a scar or anything that might be distinctive?

A Not on his face, other than the discolored teeth. I had the opportunity to view only his face for thirty seconds without interruption. I was not looking at any other part of his body. I was looking at his face. I noticed his teeth. I commented mentally upon his moustache.

Q Do you remember his ears, how they looked?

A No, I was not concentrating on his ears, only on his teeth and on his moustache. And the fact that he had what one would tend to call sloe eyes.

Q What does that mean?

A Sort of a drooping type of sensation. When you look at them not fully awake.

Q Did he look like he was on drugs?

A Did I think he was on drugs? I felt he was on a high of some sort. I don't know what one looks like when one is on drugs, but I felt he was definitely elevated.

Q When you went to the Criminal Court on August 10th, and you spoke to Fitzgerald, did he give you a description of Boyd?

A Did he give me a description of Boyd? No. It wasn't necessary. I had given him a description of Boyd.

Q Yes, yes. And did he show you a picture?

A No.

Q And you say you were never shown a photograph of Boyd, is that correct?

A No.

Q And then you saw him again at the preliminary hearing?

A Yes.

Q And then you saw him today as you were sitting here next to Mr. Schwartzwald. They brought the defendant out in handcuffs, is that correct.

A That's correct.

Q And do you remember what the District Attorney was wearing in the Criminal Court hearing?

A That day?

Q Yes?

A The hearing he was in a shirt.

Q Just in a shirt?

A He had on a shirt and necktie. It was very warm and he was anxious to get his train to Southampton, and it was after three o'clock and I remember having that conversation.

Q I said the District Attorney. Do you mean Mr. Fitzgerald?

A No, the District Attorney.

THE COURT: I have done that on a hot day if it is not in the courtroom. It is nothing unusual.

THE WITNESS: He had on a necktie.

Q Do you remember what the defendant Boyd was wearing at that time?

A A dark blue shirt, if I can remember. A blue shirt sticks in my memory.

Q What color pants did he have?

A I'm not in the habit of looking at a man's pants.

Q All you remember is he had a dark blue shirt?

A Dark blue shirt. I fixed on his face the day he appeared in my doorway. I fixed on his face at that time.

Q How long would you say you looked at him before you said that's the man or the gentleman?

A The day he was arraigned on the stolen automobile? He appeared in the doorway and without hesitation my entire body reacted, that was Mr. Boyd. A visual reaction if you would like to term it as such.

Q So you looked at him for merely a split second before you said that's the man?

A I knew immediately that that is Mr. Boyd.

Q You didn't bother to hear his voice at all, did you?

A No.

Q And was he facing you at this time?

A Directly.

Q And you were a matter of about thirty feet away, whatever?

A About the fourth pew back from the front.

Q And was Mrs. Arrington there with you?

A No, she was not.

Q Did Mrs. Arrington--was she with you when--at the preliminary hearing in the Criminal Court?

A Now, this is not the arraignment but the preliminary hearing, is that correct?

Q Yes.

A All right. Mrs. Arrington said that she would come. We were waiting for Mrs. Arrington.

Q I want to know was she there?

A They called the hearing before she arrived. She was en route at the time of the hearing.

Q And has she ever come to court with you?

A With me? No.

Q Has she ever been in the same courthouse with you?

A She was there--she arrived after the hearing was over. She was physically present in the same courthouse that I was that day.

Q And by that time Boyd had gone back into the

detention facility?

A Yes.

Q And did you ever discuss this with Mrs. Arrington?

A No.

Q No?

A I told her--I told her at the end of the hearing that I felt sure it was the man. I said "it was him, Mary."

Q You felt sure?

A Oh, yes. Yes.

Q And you told this to Mrs. Arrington?

A Yes.

Q This was before she had seen this man other than the 23rd?

A That's correct.

Q And did--

A If I had told her I didn't think it was him that would have been ridiculous. I did think it was him.

Q I wouldn't want you to lie about it.

A No.

Q Did you tell Mrs. Arrington that you had identified this man on August 10th? I withdraw the question. On August 10th you went down to the courthouse and identified Henry Boyd?

A Yes.

Q And then I assume that you went home that day?

A Yes.

Q Was Mrs. Arrington along at the time?

A When I went home? No.

Q When did you see her again?

A The day of the hearing.

Q Oh, she doesn't work everyday at the house?

A No, Mrs. Arrington did not work after that. Mrs. Arrington believed she was pregnant and Mrs. Arrington was in a very nervous state after the robbery and she was afraid to come back and be in the house. And if she worked-- maybe once or twice after that, before she stopped working. She no longer comes. Mrs. Arrington is now pregnant.

Q But you did mention to her that you were sure that it was Boyd?

A That I thought it was, yes.

Q And you mentioned they took--what did they take from the house, a sewing machine?

A A sewing machine, a color television and a black and white television.

Q Did you mention anything about his hair? Did he have an Afro?

A He had an Afro.

Q Was it long or short?

A How does one define long or short afro? It was not bushy. It conformed to the contour of his head within a reasonable limit.

Q Now, back at the Criminal Court--just a few more questions of this witness, Judge. You were sitting there with Fitzgerald as they were calling out the cases and Boyd walks in and you said, "That's him." Prior to that time did Fitzgerald or any other police officer or anybody tell you that Boyd had been arrested before that case on other charges, that he had a record?

A At some point I knew that he had a prior record, but when I became aware of it I do not know. I don't remember.

Q And this was Fitzgerald who told you this?

A It must have been. I had no contact with anyone else.

Q Did he ever communicate this to your husband?

A Did he ever communicate this to my husband?

THE COURT: Do you know whether he did or not?

THE WITNESS: My husband knows that Mr. Boyd had a previous record. I was not a party to his conversation. If he did tell me, I don't know. When my husband called me in St. Louis he told me, and not meaning to alarm me he kept the conversation as sparse detail as possible. He told me to come back

because they told him they found the car and a man answering the description I had given.

MR. MADDEN: I have no further questions, your Honor.

MR. SCHWARTZWALD: Thank you very much.

MR. MADDEN: Just a couple of more.

Q Did Fitzgerald ever show you any cards or written form about this defendant?

A What do you mean cards or written information? I haven't seen anything. Why?

THE COURT: He wouldn't tell you why. He may have his own personal reasons.

THE WITNESS: No.

THE COURT: All right.

MR. MADDEN: Thank you, Judge.

THE COURT: Thank you very much.

MR. MADDEN: Your Honor, if it please the Court, with respect to the second lady, Mrs. Arrington, I'm going to request a lineup at this time on the grounds that according to my information, this woman has never identified Henry Boyd as one of the culprits, and he's sitting here alone in the courtroom, all by himself, other than the court personnel, with no spectators, no negroes at all in the courtroom. There's

a lapse of time of perhaps seven or eight months, and there has been an indication that Mrs. Riordan has indicated that she has communicated to her she is positive.

MR. SCHWARTZWALD: Judge, I remember in the last case where Mr. Golder came in, I believe it was Mr. Madden and myself who said, this witness, just take a look. It's him or it's not him.

THE COURT: I don't think there's any need for any lineup.

MR. MADDEN: I represent the defendant in this case. Mr. Schwartzwald represents the State. If he wanted a lineup he could have one.

THE COURT: I am going to deny your application for a lineup.

MR. MADDEN: Your Honor, if it please the Court, at this time I'm requesting a lineup. We are in the courthouse. There are plenty of facilities for a lineup at this time, there being the detention facilities where there are plenty of defendants to participate in the lineup, and many of them black. There are other court personnel not in this courtroom, in other courtrooms which can be used for a lineup, and I really request the lineup at this time for the

reason that other than the other suggestive factors indicated, there is the additional factor that Mrs. Riordan who was the employer of Mrs. Arrington indicated that she had communicated to Mrs. Arrington that she was positive that the man that she had identified at the courthouse was the one who was the taller of the two, and Mrs. Arrington has never ever identified Henry Boyd as the one. And there's a lapse here of perhaps eight months or actually longer than that. I think it was June 23rd until today, March 7th. And the facilities are here. There's no good reason I can see why we couldn't have a lineup. This is not a prompt on the scene arrest or happenstance showup. There are plenty of facilities in the courthouse for a lineup, and I would request one.

THE COURT: I am going to deny your application, Mr. Madden, for a number of reasons. Firstly, there's enough testimony before the Court, that we aren't holding this defendant for trial, and if we had no other witness, besides this witness, we have enough here to send this case to a jury, on the question of identification.

Number two, to have a lineup at this point--you say there are plenty of defendants, but our personnel

here are very short and it's going to be very difficult for them to bring in defendants. For practical purposes it would be very difficult. And as I say, I think it becomes immaterial as to whether you have a lineup or not, whether she identifies him or not, when we have enough here after hearing for the Court to hold this defendant for trial.

MR. MADDEN: Your Honor, it is now about 3:37, and most of the Court Parts are drawing to a close for the day, so there is probably excess personnel available to assist us in a lineup. This is not ten-thirty where all the Parts are going full force.

THE COURT: The men here, see what their answer is.

MR. MADDEN: I'm not concerned about the court personnel at this stage.

THE COURT: I say if it were important, if it were essential, I would see that there would be a lineup and get the personnel to do it, but I don't think it is important. I think it is immaterial. After listening to the witness it would make no difference at this point whether or not the next witness will be able to identify him.

MR. MADDEN: I don't know. She hasn't identified

him yet. I would like to make an exception that the defendant's due processes has been violated because of this impermissible and unnecessarily suggestive showup at this time.

THE COURT: All right. Exception is noted, but your application is denied for a lineup.

MR. MADDEN: Let me indicate for the record that there are no spectators in this courtroom, that there are three court officers standing behind the defendant, the stenographer, the District Attorney, myself, the clerk and the Judge.

THE COURT: All right, the record will indicate that.

MR. MADDEN: And the defendant. The only one being black.

M A R Y E L I Z A B E T H A R R I N G T O N, 529

Lexington Avenue, Brooklyn, New York, called as a witness in behalf of the People, being first duly sworn, testified as follows:

DIRECT-EXAMINATION

BY MR. SCHWARTZWALD:

Q Mrs. Arrington, on June 23, 1971, were you working at 43 Joralemon Street, Brooklyn, County of Kings about three o'clock?

A Yes.

Q And did something pretty exciting happen that day?

A Yes.

Q What happened?

A Well, I was in the bathroom because it was almost my time to go home. And Mrs. Riordan said the doorbell rang but I didn't hear the doorbell, but she was in the back and evidently she heard the doorbell. And I'm wondering to myself because I had the water running in the bathroom. I was in the house closer to the bell and I didn't hear it and she did. So at this time when she went to the door, when she opened the door, I could see a hand forcing their way into the door. So at that time I stopped what I was doing. I went towards down the hall towards the door. It was two men. A tall one--

Q How tall was he?

A Six--he was very tall.

Q What did he look like?

A Well, he was very dark, and had sideburns with a moustache which I could remember him. And he wanted to know what was in the room which was the baby's room. And I told him that was the baby. And because the door was closed. Then he wanted to know what was the next door,

which was the closet, a small hall closet. So he said, "You two get in there." So as we started in, then he wanted to know about the jewelry. So Mrs. Riordan told him to look on her mantelpiece, whatever. So he went in but we had to go with him in there. So then he wanted to know what was the next door, which was in her bedroom. It was a closet. He told us to get in there and we did. And I don't know, we stayed in there about a half hour, or whatever.

Q Did you get a good look at that big tall guy, six foot tall?

A Yes.

Q He had a different face?

MR. MADDEN: Objection as to a leading question, your Honor.

THE COURT: Sustained.

Q Look around. Do you see the person, that tall guy in the courtroom?

A Yes, I do.

Q Point him out.

A It's the guy right there.

THE COURT: Indicating the defendant.

Q And you are not doing anyone a favor by pointing him out?

A No, I'm not.

MR. MADDEN: Objection.

Q If you came here and you looked at the table and it wasn't the guy what would you say?

A I would tell you that's not the guy because it's another one. Because the other one he was much nicer which I couldn't identify him.

Q This is the other guy?

A This is the other one who was much more nicer he was than the one that had the gun.

MR. SCHWARZWALD: Your witness. Thank you.

CROSS-EXAMINATION

BY MR. MADDEN:

Q Mrs. Arrington, before you came to court today into this courtroom, did you read anything at all to refresh your memory?

A No.

Q And did you speak to anybody?

A No more than the detective came to pick me up and the officer, because I was supposed to be down here this morning which was ten-thirty, but I had a doctor appointment and I couldn't make it so they came and picked me up, but I didn't refresh my memory about anything, no.

Q Did Detective Fitzgerald tell you the defendant would be in the courtroom?

A No.

Q What did he tell you?

A No, he didn't.

Q What did he tell you?

A He didn't tell me nothing. That they was going, you know, it was court day. You know. But to tell me that he was going to be in court, no, he didn't.

Q Let me ask you this, ma'am. When is the last time you have seen this man?

A The first and the last time. I saw him the day that he robbed her house. What date I don't remember. And today. Never seen him but twice. And I know him.

Q You know him?

A I know him. I'm pretty sure I mean from his looks, and I'm pretty sure he remember me.

Q You had seen him before?

A Yes, I had seen him before.

Q Where had you seen him?

A At Joralemon Street when he robbed the house.

Q That's when you think you saw him?

A Not what I think. That is when I seen him.

Q At any other time?

A Not until today.

Q I'm not sure. You said you are pretty sure you had seen him before?

A No, I saw him twice. The day that he robbed her house and today. That's twice.

THE COURT: It sounds like that to me, twice.

Q Yes.

THE COURT: She's right.

Q Did you speak to the police?

A Well, I'm going to tell you. I'm not going to lie. I was very upset. I didn't talk to the police too much. Not at the time they came to investigate the robbery. No, I didn't talk to them too much.

Q Did you give them a description?

A Well--yes, I think I did.

Q What was that description if you remember?

A That he was very tall, ugly and dark. The same thing what I told him on the day it happened.

Q That was your description?

A That was my description. And is.

Q Did you tell him that, very tall, dark and ugly?

A Right.

Q That was it?

A That's it. And you know, that's it. As far as I am concerned, that's right, he's ugly.

Q And had you ever spoken to Mrs. Riordan about this case?

A No, no, not about the case. Naturally we talked about it, because it happened in her house and I worked there, but we didn't talk about it.

Q Do you remember sometime in August Mrs. Riordan identified this man as one of the perpetrators?

A That's what she told me.

Q And she told you she was positive this was the man?

A Yes, but I still didn't see the man, you know, so I couldn't say whether she were right or whether she were wrong.

Q And did--how heavy would you say this man was?

A At the time the detective took me down I told him he was about--he had to be 190, or close to two hundred.

Q And you remember that he was very tall? That's one of the chief attributes that you remember?

A Yes.

Q Let me ask you this, Mrs. Arrington. The defendant hasn't stood up once--

A I know. He doesn't have to. It's his face.

Q Tell me about his face. Was there anything distinctive?

A Just like it look now. It's a face you can't change, unless you put on a mask.

Q What was there distinctive about his face, if anything?

A His face? There's the man there. The same man. And I'm pretty sure he remembers me. As scared as I was I'm sure he remember me.

Q Did he have any scars on his face?

A Now look, I told you I remember him. I didn't tell you there were scars or whatever. I remember the man.

Q I'm not telling you anything. I'm asking you?

A I'm answering your question.

Q Did the man who was there on June 23rd have any scars on his face?

THE COURT: Any scars or marks on his face that you know of?

THE WITNESS: I'm going to tell you, I didn't look at his face that close to tell whether there were scars, but I know his mouth. His teeth is not right. I know about his teeth.

Q You say his teeth aren't right. What about his teeth aren't right?

A Well, number one, they're uneven or something. You know. And they're not white. That I know.

Q All his teeth are not white?

A He wasn't laughing at all this. I didn't go over to the man's mouth, but Like I'm telling you, this is the man. What more do you want? This is the man.

Q Have you ever discussed this case with Detective Fitzgerald?

A Well, naturally, when he found the man. At least when he thought he found the man. Let me put it that way. He called me because naturally I had to come into court, to identify a man or something. Well naturally he had to talk to me about it.

Q What did he say to you?

A I can't remember the exact words that he said. He called me and told me he thinks he found the man because he was in the car, the getaway car. And that's it. Anybody could have stole the car from him.

Q Did he tell you that the man that he had fit the description of the guy on June 23rd?

A No, he didn't.

Q He just told you that he found a man in the car?

A No. He said he think he found the man. Because the man, this particular man was in the car, the getaway car

of the robbery. You know, I don't remember exactly what he said word for word.

Q I know. But he told you that he thought he had a man who he thought was the one. Is that what he told you?

A Even if he didn't have the man--

Q Don't argue with me.

A I'm not going to argue with you. You're trying to put me--even if he--

Q Question withdrawn.

A O.k. Withdrawn.

Q Fitzgerald told you, did he not, that he had somebody who fit the description. Did he tell you he thought he had the man?

A No, he didn't tell me that.

Q Didn't you just testify to that before?

A I said that he told me that he had a man that got away in the getaway car. That got away in the car from the robbery, but he couldn't be sure that this was the man that did the robbing at Mrs. Riordan's house.

Q The detective told you he couldn't be sure?

A That's right. He wouldn't know. He didn't see him.

Q And did he ask you to identify or come and look at this man?

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A Well, I had to go and look at some pictures, but I didn't see him in the photographs. I didn't see him.

Q Let me ask you this. When did you go to look at the pictures?

A Oh, God--

Q I don't care for the date. Do you remember what month it was?

A This happened in--the robbery happened in--

THE COURT: June.

THE WITNESS: June. It was in the last of July, the 1st of August. I don't know. But it wasn't later.

Q Pardon me?

A It wasn't recently. I didn't find him anyway.

Q O.k. Now, other than today, or yesterday, when was the last time you had spoken to Fitzgerald?

A Oh, God, the last time they had a hearing--I don't know whether it was the last time or the first time. The very last time Mrs. Riordan had been to court in connection with this case. I spoke with him that particular day. But when I got here it was over with, you know, when I got here. I think it was on Schermerhorn, whatever. It was over with. I didn't talk with him other than today. Yesterday he called me and told me that the trial of this

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man was going up for trial.

Q And did you speak to Mrs. Riordan?

A No. I hardly talks to her now.

Q And did--what's his name went down to see you, Fitzgerald and somebody else?

A Yes.

Q Did they pick you up today?

A Yes.

Q Did anyone of these people tell you--

A No, no.

Q No what?

A I can tell you before you ask.

Q What was I asking?

A If you want to say they persuaded me to say something, no.

Q They didn't persuade you at all?

A No.

Q You came into this courtroom and after a matter of perhaps a minute looking at the defendant once or twice you say that's the man?

A Not once or twice. I knew him when I walked in here. When I got here. That was the man.

Q When you walked through the door in the rear?

A When I saw him I knew that was the man.

from the side?

A That's right.

MR. MADDEN: No further questions.

THE COURT: All right, step down.

MR. SCHWARTZWALD: Thank you very much young lady, and step down.

THE COURT: Good luck to you, Mrs. Arrington.

MR. MADDEN: Judge, will you instruct the witness because she's a lovely young lady, she has to be back what tomorrow.

THE COURT: I'm sure this young lady will be here anytime you require her presence. She's a wonderful woman. What time do you think you will start the case?

MR. SCHWARTZWALD: We should be ready for this young lady at two o'clock.

THE COURT: Tomorrow at two p.m. All right?

THE WITNESS: O.k.

MR. SCHWARTZWALD: That's the People's case on the Wade hearing, your Honor.

MR. MADDEN: Well, if it please the Court, are they not going to call the police officer? I'll call the police officer.

THE COURT: Fitzgerald, is he here?

MR. SCHWARTZWALD: Yes, sure.

THE COURT: All right, call him.

Det. J O H N J. F I T Z G E R A L D, Shield number 1241, 11th Detective District, Burglary larceny Squad, Police Department City of New York, called as a witness in behalf of the defendant, being first duly sworn, testified as follows:

DIRECT-EXAMINATION

BY MR. MADDEN:

Q Detective, how long have you been on the police force?

A Seventeen and a half years.

Q In 1967 were you a detective?

A In 1967?

Q Right.

A Yes, sir.

Q And how long had you been a detective in 1967?

A How long have I been a detective?

Q Since now how long have you been a detective?

A Ten years. Ten years a detective.

Q Now, you responded to this case on what date?

A June 23rd.

Q And did you make any notes in connection with this case?

A Yes, I had notes on police forms. I have notes.

Q You weren't the first police officer there, were you?

A No, sir.

Q What did Mrs. Riordan tell you about the description of these two men?

A She described two male negroes as having entered her apartment and at gunpoint demanding money and property from her and a cleaning woman employed by her.

Q Did she give a description, physical description of either one of these two individuals?

A Yes, she gave a description of both of them.

Q What description did she give of the taller one?

A That he was a male negro in his late twenties, six foot two, six foot four. She said, "He's huge." I said, "What do you mean by huge?" She said, "Very tall man. Heavy, black skinned. He had long sideburns." And she said he was a very ugly man. She said he had his teeth discolored. That was about it. Then his clothing description she gave I have it down here. Long sideburns. He had a white shirt, dark pants. The front teeth were discolored, and he was armed with a silver gun.

Q How did she describe his build?

A Heavy, huge.

Q Did she describe it as a thin build?

A She said huge. But she said at one point, I believe she did mention that he was thin. I said, "What do you mean by thin?" She said, "Well, he's large, he's tall." It's just at one point she did say he was thin.

Q Did Mrs. Arrington give you a description?

A No. At the time I got the description from Mrs. Riordan. I didn't get a description at that time from Mrs. Arrington.

Q Did you ever get a description from her?

A I did.

Q Do you have that description?

A Yes. I got the description from Mrs. Arrington. She stated that he was a very big negro man, about six foot. Very dark skinned, in his late twenties.

Q You got that description written down?

A No, I don't have that description written down. The description very much fit the description that Mrs. Riordan gave me.

Q And then did Mrs. what's her name, Arrington, come down to look at the photographs at the BCI?

A She accompanied me at BCI.

Q No results?

A No, sir.

Q Do you know if Boyd was one of the pictures she looked at?

A No, I wouldn't know.

Q Were you there when she was looking at the pictures?

A She didn't pick anyone out.

Q How did you determine what pictures she would look at?

A I had her look at robbery photographs, burglary photographs, and male negroes five foot eight to six foot four.

Q And did Mrs. Riordan go down to BCI?

A No, she didn't.

Q Did you ask her to go down?

A I did.

Q What did she say?

A She didn't wish to go.

Q And then you put out an alarm on an automobile?

A I did.

Q And when was the next time something happened on this case?

A I was notified that a patrolman in the 79th Precinct had arrested a man and a woman in an automobile in the confines of the 79th Precinct, and the auto was wanted on

my alarm. And one of--the man that was arrested was Henry Boyd, male negro, thirty-two years, and his physical description was six-foot four, two hundred pounds, dark skinned, square face, had a missing front tooth and discolored front teeth, and he was sitting in the auto for which I had issued an alarm.

Q From what form are you reading?

A I'm reading from a note. That was a message that was left for me.

Q This refers to the automobile case?

A It refers to the man who was arrested in the automobile.

Q This is the description that the other patrolman told you?

A Right.

Q Let me ask you this, officer. Are these notes in relation to this case here?

A Yes, sir.

Q The whole page or one--

A This is the teletype that I transmitted in this case.

Q This is a description that you wrote down on the 61, right?

A Yes, sir.

Q Do you have any other notes other than those?

A No, sir.

Q Then this was what date, July 24th, 25th, that the patrolman contacted you?

A The patrolman contacted the squad and a message was left for me and the date of the arraignment that the defendant would be arraigned for my being at the court.

Q And then what did you do, contact Mrs. Riordan?

A I contacted Mrs. Riordan and she was out of town. I believe she was in St. Louis visiting her mother, and I spoke with Mr. Riordan. And I apprised him of the facts, that I would appreciate her coming to court with me on August 10th. That I possibly had one of the men involved in the robbery of her apartment.

Q And you told him that this man fit the description you had?

A Yes, the description fit the one I had.

Q And you told her about the car, right?

A Yes, sir. I told Mr. Riordan. He relayed this message to his wife. She contacted me later.

Q And then what happened?

A And then she came in from St. Louis and I picked her up. When she came back from St. Louis I told her I would meet her at her dwelling on August 10th and go to court with her to API where the defendant was going to have a

hearing on whatever the charge was the officer arrested him for.

Q Now, you told her that the man who was in on the automobile case, did you tell her his name was Henry Boyd?

A I don't recall if I told her his name. I said that he would be arraigned on the case, the man was having a hearing on his case. I don't know whether I told her his name.

Q And then you mentioned to her that his front teeth were discolored?

A Right.

Q You told her this before she identified him?

A Yes, I did. Yes.

Q And did you show her a picture of Mr. Boyd before he got into court today?

A No.

Q Did you ever show her any pictures?

A No.

Q Now, you were aware that Henry Boyd was in on another charge, correct?

A Yes.

Q On the automobile case, and this identification was taking place approximately seven weeks after the alleged crime?

A. Correct.

Q June 23rd to August 10th. And you were aware of a police regulation handed down, were you not, on July 26, 1967, concerning lineup identification?

A Yes, sir.

Q And you were aware of--well, let me ask you this. Are these the rules that were handed down? Just look at them briefly for a minute.

A Yes.

Q Are those the rules, sir?

A Yes.

Q Thank you. Now, did you advise Mr. Boyd at any time of his right to have an attorney present with an identification procedure?

A No, sir, I had never spoken to Mr. Boyd.

Q You were aware--I don't mean to be facetious. You have been in courtrooms before and in the Criminal Court and you are aware that all of these courts are staffed with Legal Aid Attorneys?

A Yes, sir.

Q And Legal Aid represented Mr. Boyd on the case, on the automobile case?

A Well, when I went to court I didn't know who was representing him.

Q But you were aware that there was going to be an identification procedure on August 10th?

A Yes.

MR. SCHWARTZWALD: I will object to this as impeaching his own witness.

THE COURT: He's not impeaching him.

Q Is that correct, sir?

A Possible identification was going to be made.

Q That's what I meant, there was going to be an identification procedure?

A Right.

Q And did you ever--you hadn't spoken to Boyd at all before that?

A No, sir, I had never seen the defendant before that day.

Q Before Mrs. Riordan identified him you had never seen the defendant before, never spoken to him?

A No, sir.

Q You never advised him of his right to an attorney. Did you ever advise him of a right to a lineup?

A I never saw him or spoke to him, counselor.

Q O.k. Now, may I see the Grand Jury minutes?

MR. SCHWARTZWALD: Surely. Let the record indicate the District Attorney is turning over the

Grand Jury minutes of September 15th, to be deemed marked Two for identification.

Q You mentioned that you were in a special squad. Is that the robbery squad?

A The burglary squad.

Q Were you ever in the robbery squad?

A No, sir.

Q What division were you in back in June and August?

A The 64th Detective Squad.

Q And you had conducted identification procedures before I assume, is that correct?

A Yes.

Q Now, I just showed you the rules of July 26, 1967. Are you aware that rule 2/a indicates--

MR. MADDEN: May I put these into evidence? It might make it easier.

THE COURT: Put it into evidence. Mark it. Those are the rules?

MR. MADDEN: These are the police lineup regulations for identification of July 26, 1967.

THE COURT: All right.

(Whereupon, the paper referred to was marked Defendant's Exhibit A for identification.)

THE COURT: Not for identification. It is in evidence.

THE COURT: You want it in evidence.

(The paper originally marked for identification was amended to read Defendant's Exhibit A in evidence.)

BY MR. MADDEN:

Q Detective, you are aware that the third paragraph, Section 2/a, indicates that the person conducting the identification procedure shall advise the defendant or the person who is about to go through this procedure that he has a right to counsel and that he has--and that he is going through an identification proceeding, is that correct?

A Well, I know I see the paragraph here, and I know what it states here, but under the circumstances I had never felt that he was represented by an attorney in the court here, and I just spoke to the District Attorney and explained the situation, that I had a witness in court and the defendant in another case was coming up and it might have been an identification.

THE COURT: You never spoke to this defendant?

THE WITNESS: That's right, I never spoke to him. I had never seen him. I didn't know what he looked like myself. So I spoke to the District Attorney. He said when the case is called see if she

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can identify him.

Q That's what the District Attorney said?

A That's right.

Q But you mentioned that he had an attorney in court, legal Aid?

A I didn't know who he had. I assumed he had to be represented in court.

Q Whoever he had, did you ever mention it to that lawyer, that there was this defendant going through an identification procedure?

A No, I did not. That's why I spoke to the District Attorney. I felt that he would be the one to talk to the attorney.

Q Do you know if he spoke to the attorney?

A I don't know.

Q Was there any reason, were there any circumstances involved why you didn't conduct a lineup in this case?

A Reasons I didn't conduct a lineup? I felt under the circumstances in a court of law being represented by counsel I wasn't sure my complainant would pick anyone out. I didn't know what he looked like. I was waiting to see if she would pick anyone out in court.

Q Did you have him seated right in front of the door that he was coming out, maybe the fourth row back?

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A Maybe the fourth or fifth row back. I didn't know which door he would be coming out.

Q They come out a number of doors?

A I thought he might be coming out on the left side, and subsequently he came out on the right side.

Q Let me ask you this. Did anyone come out before he came out?

A Yes, a number of prisoners had come out.

Q And who came out of the other door? Did any prisoners come out of that door?

A No, no prisoners. I believe court officers or someone else might have come out that door. There was very little traffic on the door on the other side.

Q And had you made up your own mind at that time that the person who was in the car was the person who robbed this woman on June 23rd?

A No, I couldn't make up my mind. I didn't know the man. I was just going on the information that he fit the description of the alarm that I transmitted.

Q So you wanted to bring her out to make a fair determination that this was the woman?

A Yes. She was the only one who could make that determination.

Q Let me ask you this. This is what I don't

understand. Wouldn't the fairest procedure have been a lineup?

MR. SCHWARTZWALD: Objection.

THE COURT: Sustained.

Q Detective, don't the regulations call for a lineup of a least four other persons?

MR. SCHWARTZWALD: Objection. He said six or seven people walked out.

THE COURT: Sustained.

MR. SCHWARTZWALD: That's the fairest type of lineup you can get.

MR. MADDEN: Your Honor, if it please the Court, my understanding of the case is, that there should be a lineup unless there are circumstances why there was no lineup. This wasn't an unseen arrest or happenstance showup.

THE COURT: You have testimony here that this officer did not conduct a lineup.

Q Let me ask you this, detective. You were in charge of the identification procedure in this case, correct?

A I was.

Q And you made the determination in your own mind not to have a lineup, is that correct?

A Not in my own mind. I felt that going to court there would be a number of prisoners.

Q Let me ask you this--

A I didn't have the lineup. No, sir. I told you I didn't.

Q Weren't these prisoners coming out one at a time through the door?

A One, two or three, I couldn't tell how they would be coming out. I felt there would be a number of prisoners. If she didn't pick anyone out I couldn't make any arrest.

Q Did you tell this woman beforehand that this man had a record?

A Before we went to court?

Q Yes? Not necessarily that day, but sometime before that day you told her Henry Boyd had a criminal record?

A I might have. I might have said that he had been arrested before, but it certainly wasn't that day. I didn't know his criminal record.

Q Was this in response to a question of hers?

A She asked me if he had been arrested before and I said yes, he had been. But I didn't know how many times.

Q What time did this identification take place on August 10th? Do you remember approximately what time of

the day? Morning or afternoon?

A It was in the morning. Early morning.

Q Do you remember the name of the District Attorney at that Part?

A No, sir, I don't

Q This Mrs. Riordan was not under any physical strain that day, was she? She wasn't under any physical illness, was she?

A No.

Q So there was no real rush for her to get out?

A To get out where?

Q To get out of the courthouse?

A No.

Q Let me ask you this, officer. On the second page under Section 9, the rules and regulations set down by the Police Commissioner, provided that no person present at the viewing shall do any action or say anything calculated to enlighten or influence the witness or victim to make or not make an identification. And then it specifically mentions that no suggestions may be communicated to the witness as to which member of the group is believed to be the culprit. Nothing may be said to or in the presence of the witness which suggests in any way which member had been arrested for the offense.

MR. SCHWARTZWALD: I object to this. This is in evidence. It's already in evidence, the whole sheet.

THE COURT: It is in evidence. What are you trying to bring out?

MR. MADDEN: A positive or negative--

THE COURT: It is in evidence. What are you trying to bring out. It is in evidence. You are reading something that's in evidence. So it makes no difference. It is here.

Q Let me ask you this, detective. These two pages of regulations that you mention you do recall, you have read these before, is that correct?

A Yes, I have read them.

Q And these are generally followed by the police department I assume since July, 1967?

A Yes.

Q And you generally follow them yourself, I assume, is that correct?

A Yes. I believe it was one or two occasions.

Q One or two occasions that you had not followed this?

A That I followed them. That I had reason to follow them.

Q What was Boyd wearing, if you remember, on August 10th as he came through that door?

A I can't recall offhand just what he was wearing that day.

Q All right. But how soon after he came through the door did Mrs. Riordan say anything?

A To tell you the truth I didn't see him come through the door. The complainant said to me, "Mr. Fitzgerald, that's him." And she slid down in the bench. She said, "That's him." I said, "Where?" She said, "That one over there. That big one over there. That's the one."

Q What did you do then?

A I said, "You are sure that's him? I'll never forget him." I went over to the District Attorney and told him the fellow there is the one she identified.

Q Did you ever inquire if that was Boyd?

A I asked who he was. I checked who he is. I spoke to the patrolman and he said, "That's the guy over there." I said, "Yes, she just identified him."

Q And then you went back to her and you told her that was Boyd?

A I said, "That's Boyd. That's the one we are down here for. That's the one who's arrested in the car case."

Q You told her that?

A Yes.

Q And what did she say?

A She said that was the one. She just sat there. I said, "O.k., you go outside. Wait in the hall."

Q What did you do with Boyd? Did you take him to the 84th?

A I took him to the 84th Precinct. Judge Booth was sitting in the court.

Q And what happened at the 84th, just fingerprinting

A I advised him of his Constitutional rights. He denied any involvement in this case, made no statements, and he was processed and I took him back to court in the afternoon.

Q Can you describe for me the area around where Mrs. Riordan identified the defendant on August 10th? She was sitting about four rows back, and there coming out of the left door, left of the Judge, what is the area like? Is it a clear view or are there people walking in between?

A There's a door just like on the side of the court here. There was no coat rack. There's a wall. And Mr. Boyd when she says to me, "that's him," he was at that time there with two other men. There were three men. I said, "Which one?" She said, "The big one." At that point Mr. Boyd was placing--was placed against the wall by the court

officer, and the two other men were taken up before the Bench on whatever the preceeding case was, and he was standing there with a court officer.

Q And is that the time that he was paroled on the other case? At that time in the courtroom was he paroled on the automobile case?

A I don't know what happened on the larceny. He was just turned over to me, to my custody. I don't know what happened to the case he was there on. I don't believe he was paroled on the other case.

THE COURT: How did he get out?

THE WITNESS: He was turned over to my custody.

Q He was paroled--

THE COURT: They had to parole him. You couldn't take him away unless he was paroled in your custody. He was paroled in your custody.

THE WITNESS: No, he's asking about the other case.

THE COURT: In the other case he was paroled in your custody on the larceny and you didn't even know that. He was paroled in your custody that day.

THE WITNESS: On my case. He was asking me about the previous case, the car case.

THE COURT: He was paroled on the car case. And

he couldn't be paroled on your case because he wasn't even arraigned.

THE WITNESS: He was paroled in my custody that case.

BY MR. MADDEN:

Q Let me ask you a couple of questions, detective. You say that was the first day that you had ever seen this defendant, August 10th?

A In the court?

Q Right.

A Yes, sir.

Q Had you ever been in court on the larceny case while this defendant was in court?

A No, sir. Not until that date.

MR. MADDEN: May I just have a moment, Judge?

THE COURT: Sure.

(Brief pause and resumed.)

Q Did you see a girl in the--you mentioned that the patrolman told you he was arrested with a girl. Was the girl in court that date too?

A August 10th.

Q She was?

A Yes.

Q Now, when you say that the girl was in court, she

was standing next to him up at the Bench with a lawyer?

A Yes. Or she was sitting down. I don't recall. There were two people in the case. Mr. Boyd and the girl.

Q Now, if I were to tell you that on August 10th her parole was revoked and a Bench warrant was issued for her arrest would that surprise you?

A Yes.

Q Would you look at these papers here, officer, a copy of the Criminal Court papers?

A Is this August 10th, the day that I arrested him?

Q Yes.

A August 10th she wasn't in court?

Q I just want to ask you a couple of more questions. I don't mean to be facetious. Were you aware that day that there was a detention facility for defendants?

A Yes.

Q There is a detention facility in the court building itself?

A Yes.

Q And defendants are brought from that facility up to the different courtrooms that they are supposed to go to, right?

A Yes.

Q And you were aware that the police--withdrawn. You

know whether or not there are facilities available for lineups?

A No, sir.

Q You don't know?

MR. SCHWARTZWALD: Objection. We have had this three or four times.

THE COURT: All right, he doesn't know. He's been asked and he doesn't know.

Q Detective, did you ever think to take the defendant either to the 84th Precinct which is--is that the one over here?

A That was on Poplar Street, the 84th.

Q Did you ever think to take the defendant to the 84th Precinct and have a lineup at the courthouse?

A I didn't think because I didn't know whether I'd be taking the right party out of the court.

THE COURT: Don't you think it would be silly to take him and bring him for a lineup after she had already identified him in the courtroom?

MR. MADDEN: This was before.

THE COURT: At what point? The first time he saw him was the first time the complainant saw him in the courtroom.

MR. MADDEN: Yes, sir.

Q August 10th, were you aware that you were going down to the courthouse?

A Yes, sir.

Q When did you get the adjourned date of August 10th for his case?

A I had that from the patrolman, I assume.

Q Did you write that down anywhere?

A I can't figure why I would have been in court that date. I would have been notified of the date. That's the only reason I would be there. I knew he would be coming up that date.

Q O.k. But in any event, were you aware that the defendant was supposed to be in court on the automobile case?

A Yes.

Q So you went down to the courthouse with the intention of having an identification procedure with Mrs. Riordan, correct?

A Yes, sir.

Q And are you saying, detective, that because you never spoke to the detective that's why you never advised him of his right to a lawyer, that's why you never asked him if he wanted a lineup?

A Yes, I never spoke to him. I didn't know him.

Q But you knew his name, correct?

A Yes.

Q And you had the docket number?

A I didn't know who he was.

THE COURT: He didn't know that this defendant was going to be pointed out by the complainant as the one who committed the robbery.

THE WITNESS: When she pointed him out to me that was the only time I knew who he was.

MR. MADDEN: Judge, I have no further questions.

MR. SCHWARTZWALD: I just have one question.

That's all.

CROSS-EXAMINATION

BY MR. SCHWARTZWALD:

Q You said that you got information when he was arrested on an automobile case that he had a broken tooth?

A Discolored teeth.

Q And something about broken?

A Broken tooth, yes.

Q What date was he arrested on the larceny, if you know?

A That would have been 7/24.

Q July--

A July 24, 1971.

Q He had a broken tooth then, discolored teeth?

A That's the message. One missing front tooth and--

Q Look at his teeth now. Do you notice any change now?

A I don't see a missing tooth.

MR. SCHWARTZWALD: Thank you very much.

Q In other words, it is different from the report that he was arrested?

A This is a message.

MR. MADDEN: I just have a couple of questions, your Honor.

REDIRECT-EXAMINATION

BY MR. MADDEN:

Q Detective, you say you didn't have a lineup because you really didn't know what the woman was going to do, if she was going to pick him out or not?

A That's right.

Q So if she didn't pick him out you would have a lineup?

A No, I wouldn't arrest him.

Q Because you weren't sure whether she was going to pick him out or not you didn't have a lineup?

A Because he was in court and I was taking her to court to make an identification. If she couldn't identify

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anybody I wouldn't have anybody to arrest.

Q After reading these records, detective, did you get the impression or were you--did you think that the best identification procedure is a lineup?

A Would I think the best would be a lineup?

MR. SCHWARTZWALD: I object what he thinks. This is not a philosophy course.

THE COURT: Let's find out what he has to say.

THE WITNESS: To tell you the truth I didn't give a thought to a lineup.

THE COURT: It didn't occur to him. At that point it didn't occur to him.

Q And you have been on the police force seventeen and a half years?

A Yes.

Q How many arrests did you make over seventeen and a half years? Many I assume?

A Yes.

Q And how many for felonies? Percentage wise.

A I would say two hundred fifty, three hundred.

Q And how many of these would you say percentage wise would be robberies?

A Twenty percent.

Q How many of these three hundred arrests would

you say involved identifications?

A By identification do you mean lineups?

Q Yes.

A That I held lineups. Not many. Maybe four, five. I can't recall off hand. Very few.

MR. SCHWARTZWALD: Thank you very much, detective.

THE COURT: All right, detective.

MR. SCHWARTZWALD: Thank you very much.

MR. MADDEN: Your Honor, if it please the Court, I call to the stand the first patrolman on the scene, Patrolman Lacarino.

THE COURT: Is he here?

MR. MADDEN: I think he is.

MR. SCHWARTZWALD: It appears that he went home, your Honor.

THE COURT: Mr. Madden, did you hear that?

MR. SCHWARTZWALD: Lacarino went home.

THE COURT: Lacarino went home.

MR. MADDEN: I'll request a continuance, Judge.

THE COURT: All right. Tomorrow morning, nine-thirty sharp. Nine-thirty tomorrow morning. Have your witness here because I want to proceed with this.

MR. MADDEN: Your Honor, I would indicate to the Court, that I want the minutes of the Wade hearing

for the trial. And as far as I know under the law I'm entitled.

THE COURT: Nine-thirty tomorrow morning to continue the Wade hearing. We will come to that point when we are finished with the Wade hearing.

(Whereupon, a recess was taken until March 8, 1972, at 9:30 a.m.)

Brooklyn, New York
March 8, 1972

(The hearing resumed.)

THE COURT: Are you ready, Mr. Madden?

MR. MADDEN: I rest. I don't wish to ask any questions.

MR. SCHWARTZMAID: Thank you, officer.

MR. MADDEN: Your Honor, if it please the Court, at the end of the entire hearing I move to suppress the pre-trial confrontation of both witnesses, Mrs. Riordan and Mrs. Arrington on the grounds that under the circumstances the defendant was not advised of his right to counsel, as per the Wade trial. And furthermore, with respect to due processes, I contend that the due processes of right of the defendant to due processes was violated inasmuch as the confrontation of both Mrs. Riordan and Mrs. Arrington were unduly and impermissibly suggested. I would point out to the Court that prior to Mrs. Riordan identifying the defendant for all purposes one in the Criminal Court, there had been a lapse of about seven weeks between June 23rd and August 10th, and under People vs ex rel, Sringie against Fellette, 2nd Circuit, Federal Court case, written by Judge Friendly, I believe, pointing out the very important fact to be

considered in applying due process tests is the length of time between the crime and the pre-trial confrontation. Then there was the People vs Ballott, the Court of Appeals case in New York, and it has been stated that such an element in itself may suffice to tip the scales to a finding of unfairness.

I would also point out as the Court is aware, that there was suggestion on the part of the police both before and after the confrontation. I believe that Mrs. Riordan and Detective Fitzgerald indicated that he had communicated to her that the defendant had a record, it was the same automobile used as the getaway car, and he was found in possession of that automobile, that he was tall, she gave his name. He mentioned to her through the husband it was the same description. And it was also mentioned by Detective Fitzgerald that he told her before the confrontation that the defendant's teeth were discolored.

With respect to Mrs. Arrington, Mrs. Riordan testified that she had told Mrs. Arrington prior to Mrs. Arrington's confrontation in court yesterday, that she was positive that this was the man. With respect to positive lineup suggestion, after Mrs. Riordan identified Henry Boyd as the taller of the two,

Detective Fitzgerald indicated to her that she had identified Boyd as the one. With respect to the suggestibility of the showup, I would point out to the Court that my understanding of the cases, is any procedure used other than a lineup when an opportunity for a lineup is available should be justified making a lineup procedure impracticable.

I would point out to the Court and argue to the Court that at the Criminal Court building there are facilities for lineups. There are many defendants there, court personnel, police officers. This was not a prompt on the scene arrest. This was a seven week lapse between the crime and arrest. Certainly it would have been fairer to the defendant if there had been a lineup. And Mrs. Arrington certainly knew, or Mrs. Riordan certainly knew when she came to court that she was coming to court to look at a person who the police felt was very possibly the one who was the taller of the two. And it was in the custody of the custodial setting of the Criminal Court building. The Courts have held, and I believe it was the Wade case, indicated that a showup is a critical stage of the procedure in which counsel, -the defendant should at least be advised of his right to have counsel at that

proceeding.

With respect to Mrs. Arrington, certainly when she came into court yesterday there had been a lapse of perhaps seven or eight months between the time that she was held up in June and March the 7th. The facilities were available for a lineup in this courthouse and I think the defendant being the only black person in the courtroom, and the rest of the people being court personnel and no spectator being present, no exigent circumstances with which to justify a showup of that sort.

For these reasons, your Honor, I would ask the Court to, number one, suppress the pre-trial confrontation of Mrs. Riordan in the Criminal Court, and also to suppress the pre-trial confrontation of Mrs. Arrington, in Part 8 yesterday. And I would also move to suppress the in court identification of the defendant on the ground that there was--that the unnecessary and impermissible suggestion was so inducive to an irreparable mistaken identification, and such identification gave rise to a tendency to a very substantial likelihood of irreparable mis-identification. And that's from *People ex rel Phipps vs Follette*, 428, Fed.2nd, 912, 2nd Circuit, another Judge Friendly case.

THE COURT: Mr. Schwartzwald, do you have anything to say about the motion?

MR. SCHWARTZWALD: Yes, your Honor. The cases hold that where the people have an adequate opportunity to see the perpetrators at the time of the crime--it is not an old woman knocked down in the snow and eight months later she sees them. And the cops say he confessed. In this case both witnesses at the time of the robbery had plenty of time and under circumstances of good lighting, good eyesight to see the person, and it is the contention of the District Attorney's office that she identified him in court as a result of the initial encounter, and it had nothing to do with what happened in AP2.

The People will go one step further. We feel that what happened in AP2 or AP1, was far, far from a showup. If anything I couldn't think of anything fairer. In other words, it was better than a lineup. This woman saw eight or ten people. The officer didn't tell her who, and when she saw him she said that was the man. The People hold that both identifications are proper and are not the suggestive type as mentioned, the old lady knocked down in the snow and eight months later the cops say he

confessed. It is he, isn't it? This is a perfect case for the proper identification. The original confrontation and also secondary identification were proper.

THE COURT: The Court finds that the identification made by Mrs. Riordan was such that there's no doubt in the Court's mind that the identification was proper, and there's no doubt in the Court's mind that it was done without violating any of the Constitutional rights of this defendant. That the identification made by Mrs. Riordan in Court was tantamount to a lineup. As a matter of fact, it was even better than a lineup as far as the defendant is concerned. She didn't know who they were going to bring into the courtroom, but the moment she saw this defendant, by a split second she testified, a split second, she knew it was he. So I must deny your motion, Mr. Madden, on the theory that the identification was good by all the witnesses, and that it was done so without violating any of the defendant's Constitutional rights. The defendant must stand trial.

MR. MADDEN: Your Honor, just to clarify the record, there's both the pre-trial confrontation and the in court identification.

THE COURT: Yes. The motion is denied in both instances.

MR. MADDEN: With respect to both witnesses?

THE COURT: With respect to both witnesses.

Are we ready to proceed to trial with this case?

MR. MADDEN: Your Honor, if it please the Court, under the People vs Brocking case, 26 N.Y.2nd, at page 530, 1970 Court of Appeals case, I'm requesting a copy of the suppression hearing minutes, and I do this not to delay any proceedings in this case, but as I mentioned to you in chambers, an experience happened to me where I didn't have the minutes and there was a conflict in the testimony and I was stuck without the minutes, so I'm requesting an adjournment in order to afford the stenographer time to type up a copy of the suppression hearing minutes.

MR. SCHWARTZWALD: Your Honor, the only thing in the case--the People of course feel it is discretionary with the Court--but we have one of the witnesses, the maid at the time, who's pregnant. She's going to give birth any day. So the record should indicate any adjournment in this case was caused by the defendant, and they should be as tolerant of us when the woman is recuperating from childbirth.

THE COURT: I don't think there will be any question about that. The Court feels that we are going to try to protect the defendant's rights as much as we can, and certainly you want an adjournment, and you feel that it is important for you to get these minutes in order to present your defense. Of course there might be a possibility of some type of conflicting testimony between the hearing and the trial. I'm going to give you that opportunity, Mr. Madden. I don't want to deprive your client or any defendant of any rights he may have. So, I certainly will not foreclose you from obtaining those minutes. But how long will it take you to get the minutes?

MR. MADDEN: At least two weeks.

THE COURT: So we have to adjourn this case I think--we must adjourn it about three weeks. All right?

MR. SCHWARTZWALD: What Monday would that be?

MR. MADDEN: 27th.

MR. SCHWARTZWALD: 27th.

THE COURT: And you would get an opportunity if you say in the case or not. Is that what you want? If you feel it is in the interests of your client we will give you the adjournment.

MR. MADDEN: Thank you, your Honor.

MR. SCHWARTZWALD: Judge, just let the record indicate that the People were ready in this case to proceed.

THE COURT: Yes. March 27th would be just on the borderline. Maybe the reporter may not have it ready.

MR. MADDEN: We can leave it for that day.

THE COURT: 27th. The reporter will make every effort to get it ready by March 27th.

MR. MADDEN: Thank you, your Honor.

Your Honor, Just one more thing with respect to your findings of fact with respect to the independent source, you feel that the identification made by the complainant was made with enough opportunity to observe?

THE COURT: Yes.

MR. MADDEN: And with sufficient detail.

THE COURT: You mean at the time of the commission of the crime?

MR. MADDEN: Yes, sir.

THE COURT: I definitely find she had plenty of time to observe this defendant at the time of the commission of the crime. In other words, if I were

trying this case without a jury there would be no doubt in my mind that her identification was a very, very good identification. Now it's up to the jury.

MR. MADDEN: You mean with respect to accuracy?

THE COURT: With respect to every detail. Accuracy and everything.

MR. MADDEN: Well, just one further point, your Honor. It was my understanding of the cases that irrespective of the guilt or innocence of the defendant, and irrespective of the external factors, the defendant was found sitting in the car which was alleged to be the getaway car in the case with respect to the pre-trial confrontation they turn to the 6th amended right, of right of counsel and right to be advised of counsel so he could either ask for it or waive it, and with respect to due process whether or not that was violated due to the suggestibility of the police officer, and also Mrs. Riordan and Mrs. Arrington. Do you think, your Honor, with respect to the pre-trial confrontation they should be suppressed?

THE COURT: I should say not. I don't think there's any suggestibility at all in this case by the police officer. He didn't suggest anything. He just

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asked her to sit in the courtroom and see if anybody coming out could be this defendant.

MR. MADDEN: I'm not talking at all, your Honor, to when she made the identification, but prior to that he had made the telephone calls with the lady and also the husband and indicated to her certain things that I mentioned before which would make that woman believe or at least tend to believe that she was going down there to pick out somebody the police thought was involved.

THE COURT: She certainly was coming down to see if one of the men that was picked up was the defendant, but there was nothing suggestive that he was the defendant. They didn't know it, and nobody knew whether he was the defendant except the complaining witness. So I don't see any suggestibility at any stage of this case. Not at all.

MR. MADDEN: Thank you, your Honor. I have an exception to this.

THE COURT: Of course you have an exception.

I hereby certify that the foregoing is an accurate transcript of the minutes taken during the above-captioned proceedings.

James M. Higgins

Official Reporter

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